SUPREME COURT OF ILLINOIS

OPINION LIST

Springfield, Illinois, August 29, 2002

Opinions have this day been filed in the following cases:

No. 88885 - People State of Illinois, appellee, v. Mark Ballard, appellant. Appeal, Circuit Court (DuPage).
Affirmed.
McMorrow, J., specially concurring.
Harrison, C.J., and Kilbride, J., dissenting.

Nos. 89388, 89471, 89534 cons. - People State of Illinois et al., appellees, v. Stanley Boclair et al., appellants. Appeals, Appellate Court, Fourth and Fifth Districts.
No. 89388-Reversed and remanded.
No. 89471-Affirmed.
No. 89534-Affirmed.
Freeman, J., specially concurring.
McMorrow, J., joined by Freeman, J., also specially concurring.
Thomas, J., joined by Fitzgerald, J., also specially concurring.

No. 89837 - People State of Illinois, appellee, v. Vincent D. Britt-El, appellant. Appeal, Appellate Court, Fourth District.
Affirmed.
Harrison, C.J., dissenting.

No. 90115 - People State of Illinois, appellee, v. Robert L. Hager, appellant. Appeal, Appellate Court, Second District.
Appellate court judgment reversed, cause remanded.

No. 91577 - In the Interests of: Tekela and Ira J., Minors, et al., appellants, v. Wanda Cooper, appellee. Appeal, Appellate Court, First District.
Appellate court reversed in part and vacated in part; circuit court order reinstated in part.
Harrison, C.J., dissenting.

No. 92238 - Ross Wayne Evans et al., etc., appellees, v. Derrick Shannon et al., etc. (Vogler Motor Company, Inc., appellant). Appeal, Circuit Court (Jackson).
Reversed and remanded with directions.

SUPREME COURT OF ILLINOIS

Springfield, Illinois, August 29, 2002

THE FOLLOWING CASES ON THE REHEARING DOCKET WERE DISPOSED OF AS INDICATED:

No. 83783 - People State of Illinois, appellee, v. William Peeples, appellant. Appeal, Circuit Court (Cook).
Petition for rehearing denied.

No. 88530 - Sam Sarkissian, etc., appellee, v. Chicago Board of Education, appellant. Appeal, Appellate Court, First District.
Petition for rehearing denied.

No. 88799 - People State of Illinois, appellee, v. James Munson, appellant. Appeal, Circuit Court (Cook).
Petition for rehearing denied.

Nos. 89497, 89511 cons. - Mark Oliveira et al., appellees, v. Amoco Oil Company, etc., et al., appellants. Appeal, Appellate Court, Fourth District.
Petition for rehearing denied.
Kilbride, J., took no part.

No. 89796 - People State of Illinois, appellee, v. David Harris, appellant. Appeal, Circuit Court (Cook).
Petition for rehearing denied.

No. 90242 - Emma J. Robinson et al., appellants, v. Toyota Motor Credit Corporation et al., appellees. Appeal, Appellate Court, First District.
Petition for rehearing denied.
Thomas, J., took no part.

No. 90318 - Pervis Daniels, appellant, v. Industrial Commission of Illinois et al., appellees. Appeal, Appellate Court, First District.
Petition for rehearing denied.
Opinion modified on denial of rehearing.

No. 90385 - Darwin Baggett, appellant, v. Industrial Commission of Illinois (Marion Community Unit School District No. 2, appellee). Appeal, Appellate Court, Fifth District.
Petition for rehearing denied.
Fitzgerald, J., dissenting upon denial of rehearing.
Thomas, J., joined by Fitzgerald and Garman, JJ., also dissenting upon denial of rehearing.

Dissents attached.

No. 90480 - People State of Illinois, appellant, v. Melvin Tisdel, appellee. Appeal, Appellate Court, First District.
Petition for rehearing denied.

No. 90539 - In the Interest of J.J. et al., Minors (People State of Illinois, appellant, v. Phyllis J., appellee). Appeal, Appellate Court, Third District.
Petition for rehearing denied.

No. 90679 - People State of Illinois, appellant, v. London Collins, appellee. Appeal, Appellate Court, First District.
Petition for rehearing denied.
McMorrow, J., joined by Freeman, J., dissenting upon denial of rehearing.

Dissent attached.

Nos. 90770 - Vernon Schultz et al, appellants, v. Northeast
90841 Regional Transportation Corporation, etc.,
cons. et al., appellees. Appeal, Appellate Court, First District.
Petition for rehearing denied.
Opinion modified on denial of rehearing.

No. 91072 - Shirley Robidoux, Indv., etc., appellee, v. Uretz J. Oliphant, etc., et al., appellants. Appeal, Appellate Court, Fourth District.
Petition for rehearing denied.

No. 91344 - In re Detention of Brad Lieberman (People State of Illinois, appellant, v. Brad Lieberman, Inmate No. 03991, appellee). Appeal, Appellate Court, First District.
Petition for rehearing denied.
Fitzgerald, J., took no part.

No. 91564 - Carpetland U.S.A., Inc., appellee, v. Illinois Department of Employment Security et al., etc., appellants. Appeal, Appellate Court, First District.
Petition for rehearing denied.

Docket No. 90385–Agenda 29–March 2001.

DARWIN BAGGETT, Appellant, v. THE INDUSTRIAL COMMISSION *et al.* (Marion Community School District No. 2, Appellee).

Dissenting Opinions Upon Denial of Rehearing

JUSTICE FITZGERALD, dissenting:

The Marion school district petitioned for rehearing in this case, arguing that, based on our decision in *Daniels v. Industrial Comm'n*, No. 90318 (March 21, 2002), it was entitled to a new Industrial Commission hearing because two of the commissioners that heard Baggett's claim–Kane and Reichert–were unlawfully appointed. In *Daniels*, a plurality opinion rendered just six days after the opinion in this case, four members of this court agreed that the appointments of Commissioners Kane and Reichert did not comply with the provisions of the Workers' Compensation Act (820 ILCS 305/1 *et seq.* (West 1992)), and remanded the matter for a new hearing before a properly constituted panel of commissioners.

In accordance with my dissent in *Daniels*, I remain firm in my belief that the *de facto* officer doctrine should apply to all of the decisions rendered by Commissioners Kane and Reichert, and should apply equally to the *Daniels* and *Baggett* cases. Under the *de facto* officer doctrine, the acts of Kane and Reichert as commissioners are valid. *Daniels*, slip op. at 14 (Fitzgerald, J., dissenting). *However*, based upon the fact that this court has chosen to give Daniels a new hearing due to the now unlawful appointments of Kane and Reichert, I can see no reason why this court should not at least consider the argument of the Marion school district that it, too, is entitled to a new hearing on the same ground. Accordingly, like Justice Thomas, I would allow the Marion school district's petition for rehearing.

JUSTICE THOMAS, also dissenting:

Less than three months ago, this court awarded employee Pervis Daniels a new Industrial commission hearing because two of the commissioners who heard his claim were appointed unlawfully. *Daniels v. Industrial Comm'n*, No. 90318 (March 21, 2002). As the *Daniels* plurality explained:

> "Where an administrative agency acts outside its specific statutory authority, as the Commission did when it appointed Kane and Reichart, it acts without jurisdiction. Its actions are void, a nullity from their inception. [Citation.] The appointment of Kane and Reichart therefore had no legal effect." *Daniels*, slip op. at 4.[1]

As it turns out, those same two commissioners also sat on the panel that rendered the decision in today's case. In its petition for rehearing, the employer in this case–Marion Community School District No. 2–brings this fact to our attention and requests the identical relief that this court awarded employee Daniels–namely, an invalidation of the Commission's decision and a new hearing before a lawfully constituted panel. This should not have been a controversial request, for our entire common law system is premised on the irreducible principle that identically situated litigants must be treated alike. Remarkably, however, the same court that awarded Daniels a new hearing has rejected the District's request without comment.

What could possibly explain this court's disparate treatment of identically situated litigants? The answer is found in Justice McMorrow's special concurrence in *Daniels*. In that special concurrence, Justice McMorrow asserts that, although she agrees with the plurality's conclusion Kane and Reichart were appointed unlawfully, "[t]he decisions in which they participated are not void." *Daniels*, slip op. at 10 (McMorrow, J., specially concurring, joined by Freeman, J.) (modified upon denial of rehearing). Rather,

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[1]I dissented in *Daniels* because I believed–and continue to believe–that Daniels waived consideration of whether Commissioners Kane and Reichart were lawfully appointed. See *Daniels*, slip op. at 17-22 (Thomas, J., dissenting, joined by Fitzgerald and Garman, JJ.).

because Kane and Reichart exercised the duties of office under the color of lawful appointment, "[t]he common law *de facto* officer doctrine operates to prevent invalidation of [their] decisions." *Daniels*, slip op. at 10 (McMorrow, J., specially concurring, joined by Freeman, J.) (modified upon denial of rehearing). To this extent, the special concurrence echoes Justice Fitzgerald's dissent. See *Daniels*, slip op. at 15-17 (Fitzgerald, J., dissenting). Unlike Justice Fitzgerald, however, the special concurrence then insists upon having it both ways. Indeed, after explaining why "the decisions rendered by Kane and Reichart may be afforded *de facto* validity," the special concurrence U-turns and declares that "the equities, on balance, militate against application of the *de facto* officer doctrine in the case at bar, to deny Daniels review by a properly constituted panel of commissioners." *Daniels*, slip op. at 12-13 (McMorrow, J., specially concurring, joined by Freeman, J.) (modified upon denial of rehearing).

So what, exactly, are the "equities" that compel vacating a perfectly valid order of the Illinois Industrial Commission in Daniels'–and only Daniels'–case? The special concurrence explains:

> "The position I take in this opinion–permitting Daniels, but no others, to have a new hearing–strikes an equitable balance between the identified competing interests. By permitting the claimant who brought the illegal appointments to light to receive a new hearing, the incentive to discover and pursue such illegality is maintained. Once the matter has been litigated and decided by the courts, however, the public interest in uncovering and addressing illegality is served. At that juncture, the public interest in preserving the validity of a large multitude of commission decisions takes precedence. Public policy and competing public interests often require courts to draw equitable lines. That line is best drawn in this case by permitting Daniels a new hearing, but by applying the *de facto* officer doctrine to maintain the validity of the decisions rendered by the illegally composed commission in other cases." *Daniels*, slip op. at 13

(McMorrow, J., specially concurring, joined by Freeman, J.) (modified upon denial of rehearing).

Thus, despite concluding that the decisions rendered by Kane and Reichart are perfectly valid under the *de facto* officer doctrine, Justice McMorrow ultimately concludes that "applying the *de facto* doctrine to the plaintiff's case at bar *** would *** run counter to a competing public interest–uncovering illegal appointment procedures, thereby ensuring that administrative agencies comply with the statutory mandates which govern them." *Daniels*, slip op. at 13 (McMorrow, J., specially concurring, joined by Freeman, J.) (modified upon denial of rehearing).

This analysis is flawed in several respects. To begin with, according to the special concurrence, the interest that is served by "permitting Daniels, but no others, to have a new hearing" is the public's interest in "having illegal actions uncovered, reported and addressed by the courts." *Daniels*, slip op. at 13 (McMorrow, J., specially concurring, joined by Freeman, J.) (modified upon denial of rehearing). But how is the public served by an arbitrary suspension of the *de facto* officer doctrine in a single case? To be sure, in *Daniels*, this court "uncovered" and "reported" the illegality of Kane and Reichart's appointments, but this court by no means "addressed" that illegality. Indeed, the denial of rehearing in today's case confirms that this court emphatically *refuses* to address it. Other than Pervis Daniels, no member of the public will benefit from this court's determination that Kane and Reichart were appointed unlawfully. From the public's perspective, Kane and Reichart might as well have been appointed lawfully, because all of their decisions but one are valid and enforceable. Just ask the District.

That said, the empty appeal to the "public interest" is by no means the only flaw in the special concurrence's analysis. Borrowing from the vocabulary of microeconomics, the special concurrence asserts that, by arbitrarily singling out Daniels for undeserved appellate relief, "the incentive to discover and pursue [unlawful office holding] is maintained." *Daniels*, slip op. at 13 (McMorrow, J., specially concurring, joined by Freeman, J.) (modified upon denial of rehearing). But is it? The District, of course, endeavored to pursue unlawful office holding and had the

door slammed in its face. And this reveals the flaw in the special concurrence's theory of incentives. By dangling the prospect of undeserved appellate relief before the public, this court is inviting an indeterminate number of future litigants to pursue what, for all but one of them, will be an empty exercise. Consider the following hypothetical. The Chicago Tribune runs a story bearing the headline, "Governor's appointment procedures called into question." The very next day, and in direct response to the special concurrence's invitation, 100 lawsuits are filed challenging the validity of the decisions rendered by the officers in question. Assuming the challenged decisions are *de facto* valid, only one of those litigants will receive undeserved relief. This means that 99 other litigants, all of whom invested a great deal of time, grief, and expense *at the invitation of this court*, will have done so in vain. Given this reality, the rational litigant would *not* file suit because, while bearing one hundred percent of the litigation's costs, he or she would stand only a one percent chance of reaping the litigation's benefit. Litigation is not a raffle, and appellate relief should not be a door prize.

For that matter, under the hypothetical facts set forth above, how will this court decide who the lucky recipient of undeserved appellate relief will be? Again, 100 lawsuits are filed on the same day. Presumably, those cases will take varying amounts of time to work their ways through the system. Will the door prize go to the first to have his or her challenge adjudicated by the trial court? Surely not, for this would punish litigants whose arguments are more complex or whose cases are assigned to backlogged courtrooms. The first case to be decided by appellate court? This presents the same inequities that arise in the trial court. The first petition for leave to appeal filed in this court? This is a possibility, but this court often passes on an issue several times before finally granting leave to appeal. The first petition for leave to appeal allowed by this court? Maybe, but again, what if the first petition allowed is not the first one filed? The answer, of course, is that there is no answer, because courts should not be in the business of singling out and conferring upon isolated litigants relief that the law clearly prohibits.

Finally, consider the additional incentives inspired by singling out Daniels for undeserved appellate relief. As the special concurrence concedes, Daniels' challenge to Kane and Reichart's authority was procedurally defaulted "because Daniels failed to challenge the validity of the appointments before the Board." *Daniels*, slip op. at 14 (McMorrow, J., specially concurring, joined by Freeman, J.) (modified upon denial of rehearing). Even worse, as I pointed out in my *Daniels* dissent, Daniels also failed to challenge the validity of the appointments before the circuit court on administrative review. *Daniels*, slip op. at 18 (Thomas, J., dissenting, joined by Fitzgerald and Garman, JJ.). And if that were not enough, by the time Daniels got around to raising the issue in the appellate court, the factual basis for his claim arose not from the record on appeal but from an affidavit from Daniels' counsel that was attached *without leave of court* as an appendix to Daniels' appellate court brief. *Daniels*, slip op. at 18 (Thomas, J., dissenting, joined by Fitzgerald and Garman, JJ.). Thus, in singling out Daniels for unwarranted appellate relief, this court is rewarding Daniels not only for advancing a losing argument on appeal but also for procedurally defaulting that issue before two separate tribunals and for injecting into his case matters wholly outside the record. What type of incentive does this create?

The bottom line is that there are only two legitimate means of addressing the issue raised both by Daniels' appeal and the District's petition for rehearing. Either the decisions rendered by Kane and Reichart are *de facto* valid, in which case no one gets a new hearing, or those decisions are void, in which case everyone gets a new hearing. There is no middle ground, and in attempting to forge one, this court breaches its fundamental duty to ensure that the law is administered fairly and equally.

I would grant the District's petition for rehearing.

JUSTICES FITZGERALD and GARMAN join in this dissent.

Docket No. 90679–Agenda 12–November 2001.

THE PEOPLE OF THE STATE OF ILLINOIS, Appellant, v. LONDON COLLINS, Appellee.

Dissent Upon Denial of Rehearing

JUSTICE McMORROW, dissenting:

I dissent from the court's denial of rehearing because the majority opinion in this case is in conflict with *People v. Boclair*, Nos. 89388, 89471, 89534 cons. (August 29, 2002), and no explanation or justification has been offered by the majority for the discrepancy between the two cases. I also dissent because, as set forth in detail below, the majority opinion is unsupported by legal authority and is beset with fundamental analytical flaws.

I

In *Boclair*, this court was asked to decide whether a post-conviction petition which has not been filed within the time limitations set forth in section 122–1 of the Post-Conviction Hearing Act (Act) (725 ILCS 5/122–1 (West 2000)) and which has failed to allege facts which show that the delay in filing was not due to the petitioner's "culpable negligence," may be summarily dismissed as "frivolous or *** patently without merit" under section 122–2.1(a)(2) of the Act (725 ILCS 5/122–2.1(a)(2) (West 2000)). This court concluded that such a petition could not be summarily dismissed. In so holding, we reasoned that the circuit court could not consider the timeliness of the post-conviction petition at the summary dismissal stage of the proceedings because the time limitations were neither included nor mentioned in the section of the Act which authorizes summary dismissals. We explained:

> "Section 122–2.1(a)(2) requires the circuit court to determine within 90 days of the filing of a post-conviction petition whether the petition is 'frivolous or is patently without merit.' 725 ILCS 5/122–2.1(a)(2) (West 2000). Importantly, we note that this section is silent regarding

timeliness. Rather, timeliness is addressed elsewhere, in section 122–1(c), instructing defendants as to the time periods for filing petitions. If this court can ascertain legislative intent from the plain language of the statute itself, that intent must prevail. *Barnett v. Zion Park District*, 171 Ill. 2d 378 (1996). We will not depart from the plain language of the statute by reading into it exceptions, limitations, or conditions that conflict with the express legislative intent. *Barnett*, 171 Ill. 2d at 389.

Under a plain reading of section 122–2.1(a)(2), the circuit court may dismiss a post-conviction petition at the initial stage only if the petition is deemed to be 'frivolous or patently without merit,' not if it is untimely filed. If the legislature intended for a trial judge to *sua sponte* dismiss a petition as being untimely, it would have so provided in section 122–2.1(a)(2) of the Act. Instead, the legislature provided in section 122–5 that the State may file a motion to dismiss. [Citation.] By addressing timeliness and frivolousness in separate provisions of the Act, the legislature plainly intended to draw a distinction between these two flaws of post-conviction petitions." *Boclair*, slip op. at 6-7.

After reaching the above conclusions, we went on to determine that the phrase "frivolous or *** patently without merit" refers only to the substance of the claim alleged in the petition, not any procedural requirements or limitations imposed by the Act. We noted:

"To accept the argument that the circuit court has the authority to dismiss [an untimely] petition pursuant to section 122–2.1(a)(2) of the Act we would have to hold, contrary to the language of the Act, that the phrase 'frivolous or *** patently without merit' encompasses untimely petitions. We will not ignore the Act's language and adopt this interpretation. If a petition is untimely that does not necessarily mean that the petition lacks merit." *Boclair*, slip op. at 7.

We also explained that it would be improper for a circuit court to consider the timeliness of a post-conviction petition at the

summary dismissal stage because such an inquiry might require the court to determine whether the petitioner had alleged facts showing a lack of "culpable negligence" which would excuse the tardy filing. See 725 ILCS 5/122–1(c) (West 2000). Making a determination as to whether a petitioner lacked culpable negligence, we observed, would require the circuit court to do more than examine whether the petition alleged a violation of a constitutional right. We concluded that this would be improper:

> "Moreover, when a circuit court determines whether a defendant is culpably negligent in filing his petition late, the circuit court makes an assessment of the defendant's credibility. See *McCain*, 312 Ill. App. 3d at 531. At this initial stage of the proceedings, however, *the court should only determine whether the petition alleges constitutional deprivations*. The process at the summary review stage measures a petition's substantive virtue rather than its procedural compliance. See *Johnson*, 312 Ill. App. 3d at 534. In determining an issue of credibility, the circuit court necessarily exceeds the boundary set by section 122–2.1(a)(1)." (Emphasis added.) *Boclair*, slip op. at 8.

Finally, we noted that it was inappropriate as a matter of policy for the circuit court to consider the timeliness of a post-conviction petition at the summary dismissal stage because to do might result in the loss of a meritorious claim of actual innocence. As we explained:

> "Claims of actual innocence may be raised in a manner other than in a post-conviction petition, including in a section 2–1401 motion. 735 ILCS 5/2–1401 (West 2000). Nonetheless, to allow the circuit court to dismiss summarily post-conviction petitions for failure to present evidence of actual innocence in a timely manner could lead to a miscarriage of justice. Although our criminal justice system needs finality in criminal litigation and judgments, it should not come at the expense of justice and fairness." *Boclair*, slip op. at 8.

For the foregoing reasons, we concluded in *Boclair* that matters of timeliness must "be left for the State to assert during the second stage of the post-conviction proceedings." *Boclair*, slip op.

at 8. During the initial, summary dismissal stage of post-conviction proceedings, *Boclair* holds, a circuit court may not consider whether a post-conviction petition has satisfied the procedural requirement of timeliness.

II

In the case at bar, the majority holds that the summary dismissal of defendant's *pro se* post-conviction petition was proper because defendant failed to comply with the affidavit requirement set forth in section 122–2 of the Act (725 ILCS 5/122–2 (West 2000)). That section states, in pertinent part, that "[t]he petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." 725 ILCS 5/122–2 (West 2000). Defendant's petition *does* contain an affidavit which attests to the truthfulness of the claim presented in his petition which is at issue here, *i.e.*, that his court-appointed attorney failed to comply with his request to file an appeal. However, according to the majority, that affidavit serves only to verify the allegations in the petition. As such, the majority reasons, defendant's affidavit is sufficient to satisfy section 122–1(b) of the Act (725 ILCS 5/122–1(b) (West 2000) (post-conviction petition must be verified by affidavit)), but is insufficient to satisfy the requirements of section 122–2. Slip op. at 6.

To satisfy the affidavit requirement of section 122–2, the majority holds, defendant should have attached at least one additional affidavit in support of his post-conviction claim. This second affidavit is necessary, the majority reasons, to show "that the verified allegations are capable of objective or independent corroboration." Slip op. at 6. Presumably, therefore, the additional affidavit must come from someone other than defendant. The majority further holds that, in the absence of a second affidavit, defendant was required to "at least explain why such [objective or independent] evidence is unobtainable." Slip op. at 7. In the majority's view, defendant's failure to comply with this latter "pleading requirement," by itself, warrants summary dismissal of his post-conviction petition. Slip op. at 5, 7. The majority emphasizes that it is not deciding in this case whether defendant's petition alleges a constitutional deprivation. See slip op. at 7

(distinguishing *People v. Edwards*, 197 Ill. 2d 239 (2001)). Rather, the majority's holding rests solely on the affidavit requirement of section 122–2.

III

The majority opinion in this case conflicts with *Boclair* at every significant point in its analysis. For example, the majority opinion at bar states:

> "*Contrary to the clear mandate of section 122--2 of the Act*, defendant's petition was unsupported by 'affidavits, records, or other evidence' and offered no explanation for the absence of such documentation. This fact alone justifies the summary dismissal of defendant's petition." (Emphasis added.) Slip op. at 5.

The affidavit requirement that the majority finds dispositive in this case is found in section 122–2 of the Act, not section 122–2.1, the section of the Act which authorizes summary dismissal. Pursuant to *Boclair*, a circuit court may not look to any section of the Act other than section 122–2.1 to determine whether a post-conviction petition is subject to summary dismissal. See *Boclair*, slip op. at 6.

In addition, *Boclair* holds that the only inquiry the circuit court may make at the summary dismissal stage is whether the post-conviction petition "alleges constitutional deprivations." *Boclair*, slip op. at 8. In other words, under *Boclair*, the circuit court is limited at the summary dismissal stage to asking whether the petition states the " 'gist of a constitutional claim.' " *Boclair*, slip op. at 6, 8, quoting *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). According to *Boclair*, matters of "procedural compliance" (*Boclair*, slip op. at 8) may *not* be considered in the initial stage of post-conviction review.

In contrast, the majority opinion in the case at bar does not consider whether defendant's petition successfully alleges a constitutional deprivation by stating the gist of a constitutional claim. Instead, the majority concerns itself solely with whether defendant complied with the affidavit requirement of section 122–2. In contrast to *Boclair*, the majority in this case holds that

the circuit court *should* consider whether a *pro se* defendant has complied with the Act's procedural requirements at the initial stage of post-conviction review. The majority holds that a *pro se* defendant's failure to explain the absence of a second affidavit is sufficient reason, standing alone, to summarily dismiss a post-conviction petition (slip op. at 5, 7), even though the failure to provide that explanation "does not necessarily mean that the petition lacks merit" (*Boclair*, slip op. at 7).

The majority opinion in the case at bar also conflicts with the policy concerns expressed in *Boclair*. As noted, the majority in this case holds that a *pro se* post-conviction petition should be summarily dismissed if it fails to comply with one of the pleading requirements set forth in section 122–2 of the Act. Section 122–2 provides, in full:

> "The petition shall identify the proceeding in which the petitioner was convicted, give the date of the rendition of the final judgment complained of, and clearly set forth the respects in which petitioner's constitutional rights were violated. The petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached. The petition shall identify any previous proceedings that the petitioner may have taken to secure relief from his conviction. Argument and citations and discussion of authorities shall be omitted from the petition." 725 ILCS 5/122–2 (West 2000).

According to the majority, defendant in this case failed to satisfy section 122–2's requirement that he "at least explain" why a second affidavit was not attached to his petition. Slip op. at 7. Therefore, the majority holds, his petition was properly dismissed at the summary review stage. Slip op. at 7. Notably, in reaching this conclusion, the majority chooses not to provide defendant with the opportunity to amend his post-conviction petition with an explanation for why an additional affidavit is unavailable. Our case law would permit such an amendment. See *People v. Watson*, 187 Ill. 2d 448 (1999). Nevertheless, the majority holds that defendant's petition should be finally dismissed.

The majority's decision not to permit any amendment of defendant's post-conviction petition is of considerable importance. Under this holding, it is possible that a *pro se* defendant who has a meritorious constitutional claim, including a claim of actual innocence, may never have that claim reviewed by the courts solely because of a technical pleading defect that is easily subject to correction through amendment. The majority recognizes that its holding "will, in some cases, place an unreasonable burden upon post-conviction petitioners." Slip op. at 7. However, the majority feels constrained by the language of the Act to reach this result. See slip op. at 7 ("[n]othing in the Act" authorizes the circuit court to depart from section 122–2's pleading requirements at the summary dismissal stage).

Boclair reaches a contrary result. In *Boclair*, we held that it would be a "miscarriage of justice" for a meritorious claim of actual innocence to evade judicial review because of a procedural deficiency in the post-conviction petition. According to *Boclair*, allowing a claim of actual innocence to be lost because of a procedural deficiency would be contrary to principles of "justice and fairness." *Boclair*, slip op. at 8.

In sum:

- The majority opinion in this case holds that, in determining whether a *pro se* post-conviction petition is subject to summary dismissal, the circuit court should look beyond section 122–2.1(a)(2) of the Act and consider whether the petition has complied with the pleading requirements set forth in section 122–2. *Boclair* holds that the circuit court may *not* consider sections of the Act other than section 122–2.1(a)(2).

- The majority opinion in this case upholds the summary dismissal of defendant's petition without considering whether defendant's petition states the gist of a constitutional claim. *Boclair* holds that the circuit court may dismiss a post-conviction petition at the initial stage of review *only* if the petition fails to state the gist of a constitutional claim.

• The majority opinion in this case holds that a technical pleading deficiency in a *pro se* post-conviction petition warrants its summary dismissal. *Boclair* holds that, at the summary dismissal stage, the circuit court should not consider whether the petition is in "procedural compliance." *Boclair*, slip op. at 8.

• The majority opinion in this case holds that the language of the Act requires strict procedural compliance from *pro se* post-conviction petitioners at the summary dismissal stage. *Boclair* holds that such compliance may not be required at the initial stage of post-conviction review because to do so could result in "a miscarriage of justice." *Boclair*, slip op. at 8.

Our opinion in *Boclair* and the majority opinion in this case are in direct and irreconcilable conflict. Given this conflict, it is clear that the court's opinion in *Boclair*, as the later issued of the two opinions, has overruled the majority opinion in the case at bar. As I noted in my separate opinion in *Boclair* (see *Boclair*, slip op. at 30 (McMorrow, J., concurring in part and dissenting in part, joined by Freeman, J.)), the court's decision in *Boclair* to overrule the instant case cannot, by itself, be considered error. It is error, however, for the court in the case at bar not to acknowledge that fact. Because *Boclair* has overruled the majority opinion in this case, rehearing should be granted.

IV

Although the conflict between *Boclair* and the majority opinion in the case at bar is a sufficient basis, by itself, to grant defendant's petition for rehearing, there are also several other compelling reasons to allow rehearing in this case.

The Meaning of 'Objective Corroboration'

Setting *Boclair* to one side and assuming, *arguendo*, that the circuit court may consider a post-conviction petition's compliance with section 122–2 at the summary dismissal stage, rehearing should be granted in this case because the majority opinion overlooks, and thus fails to answer, a very basic question: Why is

it that the affidavit submitted by defendant in this case cannot serve two purposes? In other words, Why is it that defendant's affidavit cannot verify the allegations in the post-conviction petition while also substantiating those same allegations? The majority holds that a second affidavit is necessary in this case to show "that the verified allegations [in the petition] are capable of objective or independent corroboration." Slip op. at 6. But in this case, *defendant was a party to the conversation he had with his attorney regarding his appeal*. Why then does defendant's sworn statement that his attorney told him he would appeal his case, but then neglected to do so, fail to satisfy the "objective corroboration" that the majority requires? As far as I can determine, the only way one could conclude that defendant's affidavit in this case does *not* provide "objective corroboration" for his claim would be to assume that defendant is not telling the truth. But we are not permitted to make such an assumption at this stage of the proceedings. When the circuit court examines a post-conviction petition at the first stage of review pursuant to section 122–2.1(a)(2) of the Act, it must accept everything in the petition as true. See *People v. Coleman*, 183 Ill. 2d 366, 380-81 (1998). Certainly, if defendant's petition were to advance to an evidentiary hearing, defendant's testimony by itself, if believed by the circuit court, would establish the truth of his factual assertions. Why then is the majority imposing a greater burden of evidentiary "corroboration" on the *pro se* defendant at the summary dismissal stage of the proceedings? The phrase "objective or independent corroboration" (slip op. at 6) does not appear in the Act and the majority has offered no authority for its proposition that, under the circumstances presented here, defendant must supply a second affidavit to "corroborate" his post-conviction claim at the summary dismissal stage. At a minimum, rehearing should be granted to explain why defendant's affidavit fails the majority's corroboration requirement.

Inapposite Authority

The majority states that defendant's failure to attach a second affidavit or explain its absence is "fatal" to his petition. Slip op. at 5. In support of this statement, the majority cites *People v. Turner*,

187 Ill. 2d 406, 414 (1999), *People v. Coleman*, 183 Ill. 2d 366, 380 (1998), and *People v. Jennings*, 411 Ill. 21, 26 (1952). Slip op. at 5. These cases are manifestly distinguishable from the case at bar. *Jennings* is inapposite because that case predates the addition of section 122–2.1(a)(2) to the Act. The petitioner in *Jennings* was represented by counsel and summary dismissal was not a possibility. *Turner* and *Coleman* are death penalty cases. There is no summary dismissal for post-conviction petitions filed in capital cases. See 725 ILCS 5/122–2.1(a)(1) (West 2000). It is plainly inappropriate to rely on these decisions in this case, which is concerned solely with the requirements a noncapital post-conviction petition must meet at the summary dismissal stage.

Although the majority cites no pertinent authority to support its holding, there is authority from this court, directly on point, which is contrary to the majority's position. As I noted in my original dissent in this case, over 30 years ago, in *People v. Williams*, 47 Ill. 2d 1 (1970), this court held that when a *pro se* post-conviction petitioner's claim of ineffective assistance of counsel is based on an attorney-client conversation, the only supporting affidavit required is the defendant's own. In *Williams*, we stated:

> "The State's only contention is that the petition is insufficient to entitle petitioner to a hearing in that it was not accompanied by supporting affidavits. But the only affidavit that petitioner could possibly have furnished, other than his own sworn statement, would have been that of his attorney who allegedly made the misrepresentation to him. The difficulty or impossibility of obtaining such an affidavit is self-apparent. In *People v. Wegner*, 40 Ill. 2d 28, where similar allegations of misrepresentations of counsel as to sentence were made, we held that dismissal of the petition without a hearing was improper; that defendant was entitled to an evidentiary hearing even though the State had filed a counteraffidavit of defendant's attorney in which he denied making the statement attributed to him. It would certainly follow that if a defendant is entitled to a hearing despite a counteraffidavit of his attorney denying the allegations of the petition then

> a defendant should not be denied a hearing merely because he did not obtain a supporting affidavit from the attorney who represented him at the time of his plea.
>
> Under such circumstances, to so strictly construe the Act as requested by the State would defeat its very purpose by denying petitioner a hearing on the factual issue raised by the pleadings. However, as stated in *People v. Reeves*, 412 Ill. 555, we do not intend hereby to lessen the duty of petitioners under the Act to make a substantial showing of a violation of constitutional rights, for the allegations of mere conclusions to that effect under oath will not suffice. We do find that in this case the sworn statements of petitioner warrant a fair inference of a violation of constitutional rights which are not negated by the State nor by the record, and that an evidentiary hearing is required to determine the truth or falsity of petitioner's allegations." *Williams*, 47 Ill. 2d at 4-5.

I explained at length in my original dissent in this case why the majority's attempt to factually distinguish *Williams* fails. I leave it to the reader to decide whether the majority has accurately represented the facts in *Williams*. For myself, I must reluctantly conclude, as Chief Justice Harrison once remarked, that "*[s]tare decisis* means nothing" (*People v. Kinkead*, 182 Ill. 2d 316, 348 (1998) (Harrison, J., specially concurring)) to the majority in this case. Rehearing should be granted in this case to strike the citations to inapposite case law and to conform the majority opinion with our holding in *Williams*.

Failure to Permit Amendment of Defendant's Petition

In recent years there has been a growing public discussion regarding possible shortcomings in the Illinois criminal justice system. Most of the discussion has centered on the cases of 13 individuals who have been released from death row in Illinois. These cases have provoked a serious reexamination of capital punishment in this state and prompted some individuals to question the integrity of our criminal justice system itself. Chief Justice Harrison, for example, has expressed this view:

> "[L]egislatures and the courts appear to have abandoned any genuine concern with insuring the fairness and reliability of the system. Achieving 'finality' in death cases, and doing so as expeditiously as possible, have become the dominant goals in death penalty jurisprudence." *People v. Bull*, 185 Ill. 2d 179, 227 (1998) (Harrison, J., concurring in part and dissenting in part) (noting that legal oversight of the capital punishment system has diminished and that "[t]he General Assembly has drastically shortened the period in which post-conviction relief can be sought, thereby reducing the time in which exonerating evidence may be discovered").

Voicing concerns over the fairness and reliability of the capital punishment system, Governor Ryan imposed a moratorium on the death penalty in January 2000. Shortly thereafter, he authorized the creation of the Commission on Capital Punishment and charged that body with making recommendations " 'designed to further ensure the application and administration of the death penalty in Illinois is just, fair and accurate.' " T. Sullivan, *Repair or Repeal-Report of the Governor's Comm'n on Capital Punishment*, 90 Ill. B.J. 304, 304 (2002). In its recently issued final report, the commission makes numerous recommendations for improving the capital punishment system. Importantly, however, for purposes of the case at bar, the commission notes that many of the problems underlying the capital punishment system pertain to the criminal justice system as a whole:

> "It became readily apparent during many of the discussions on particular points, however, that recommendations that were being made with respect to the capital punishment system could apply with equal force to other cases in the criminal justice system.
>
> During some of its discussions, Commission members were struck by the fact that particular cases received a much higher level of scrutiny because capital punishment was involved. Had those same defendants been sentenced to life imprisonment, or a term of years, their cases might not have been reviewed as carefully and by so many different parties. As a result, some of the injustices with

> which the public has recently become acquainted might not have been corrected." Report of the Governor's Commission on Capital Punishment, ch. 14, at 188 (April 2002).

I explained previously in this dissent how the majority opinion in the case precludes a *pro se* defendant from amending his post-conviction petition to correct pleading deficiencies and how this holding means the possible loss of meritorious constitutional claims. It is both ironic and unfortunate that at a time when the entire Illinois criminal justice system is under intense scrutiny and serious questions have been raised regarding its fairness and accuracy, the majority has decided to completely foreclose consideration of meritorious constitutional claims, including claims of actual innocence, based on technical pleading deficiencies. As stated, our case law permits the amendment of post-conviction petitions at the summary dismissal stage. See *People v. Watson*, 187 Ill. 2d 448 (1999). Even assuming, therefore, that *pro se* defendants should be held accountable for section 122–2's pleading requirements at the summary dismissal stage, rehearing should be granted in this case and the majority opinion modified to provide defendant with the opportunity to amend his post-conviction petition with an additional affidavit or an explanation for why such an affidavit is unavailable.

The majority's decision in this case is contrary to both recent and long-established precedent of this court and, with due respect, is profoundly ill-advised. I therefore dissent from the court's denial of rehearing.

JUSTICE FREEMAN joins in this dissent.